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## Podcasting Pop Songs?: Licensing Concerns with Podcasts That Contain Mainstream Music

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# PODCASTING POP SONGS?: LICENSING CONCERNS WITH PODCASTS THAT CONTAIN MAINSTREAM MUSIC

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By Jared Barrett<sup>1</sup>

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## Abstract

Podcasting is a new distribution medium that allows a vast array of users to transmit audio or video programs ("podcasts") to wide audiences. Typically, recipients use handheld devices, such as an iPod, or personal computer to capture and retain a podcast for later playback. Podcasts are diverse in form and content, ranging from talk-radio shows to political speeches to educational programs. One area of content that has been slow to develop, however, is the inclusion of mainstream music in podcasts. Many podcasters have avoided the use of mainstream music altogether because of difficulties in determining how podcasting music fits within the existing copyright framework. This Article attempts to clarify how podcasting music fits within the framework by comparing how the basic principles of music copyright apply to podcasting and by contrasting podcasting to terrestrial broadcasting and webcasting.

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## INTRODUCTION

<1> Copyright protection for music has been developing over the last decade in response to technological advancements. The Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA") both clarified the rights for downloadable music and granted a new limited right to performances using digital transmissions.<sup>2</sup> Subsequently, the Digital

Millennium Copyright Act of 1998 ("DMCA"), clarified the application of copyright laws to webcasting and streaming media.<sup>3</sup> Podcasting is a recent technological development and presents additional challenges for copyright law.

<2> Podcasting is a means of distributing audio and video programs via the Internet that lets users subscribe to a number of files, also known as "feeds," and then hear or view the material any time they choose. Users can listen to the podcast at any time because podcasting involves downloading a file containing the audio or video content from the podcaster's server to the user's computer or portable player. Podcasting is well suited for distributing various types of content, including radio-show type programs that include mainstream music.<sup>4</sup> The uncertainty of how existing copyright laws apply to podcasting, however, may have stifled the inclusion of mainstream music in podcasts. To clarify the rights associated with podcasting mainstream music, this Article first provides a brief overview of the basics of music copyright. Second, the Article applies the basics to terrestrial broadcasting, webcasting and podcasting. Lastly, the Article provides recommendations on what options a podcaster may presently take with respect to including copyright-protected music in podcasts.

## PODCASTING – AN OVERVIEW

<3> "Podcasting" is a merger of the words iPod and broadcasting, and initially received its name through association with Apple Computer's iPod music player. Today, the term refers to any software and hardware combination that permits the downloading and playing of files on any device that is capable of playing modern audio and/or video formats, such as the MP3 format.<sup>5</sup> For purposes of this Article, however, discussion is limited to podcasts in audio format.

<4> Users can subscribe to a particular audio program and receive automatic downloads via the Internet when new programs become available. In addition, users may also manually download individual podcasts from numerous websites.<sup>6</sup> These programs are then stored on a user's device, such as any portable MP3 player or personal computer, thus allowing the user to play, pause, fast-forward and rewind the podcast.<sup>7</sup>

<5> There is a wide range of individuals and entities that podcast ranging from individual podcasters to large corporations. Anybody with bandwidth, a website, a computer with a microphone and necessary software can become a podcaster.<sup>8</sup> Examples of podcasters include news organizations, politicians, religious groups and educators. President George W. Bush's radio addresses are available as podcasts, as well as the Rush Limbaugh talk show.<sup>9</sup> In addition, thousands of individuals/hobbyists, small business owners, and the like take advantage of this unique distribution medium to reach their audiences and clients. Podcasting offers an efficient distribution medium by creating direct customer contact, thus removing the need for and expense of intermediate distributors.

<6> Although a broad range of individuals and entities use podcasting to distribute diverse content, there is one area where copyright concerns appear to have stunted growth. The uncertainty in how to acquire the necessary licenses to copyrighted music has led many podcasters to avoid the use of mainstream music as part of podcasts.<sup>10</sup> While there is an efficient licensing system for terrestrial broadcasts and music-streaming on the web, there is no efficient licensing system for podcasting mainstream music.<sup>11</sup>

## THE BASICS OF MUSIC COPYRIGHT

### i. Two Unique Copyrights: Musical Work and Sound Recording

<7> The use of a recorded song implicates two separate and unique copyrights: one in the "musical work" and one in the "sound recording."<sup>12</sup> A copyright in the "musical

work” protects the music and lyrics in the underlying composition.<sup>13</sup> For example, in Eric Clapton’s performance of *I shot the Sheriff*, a copyright in the “musical work” would protect Bob Marley’s underlying lyrics and notes in composition form (a score). The copyright in the “sound recording,” on the other hand, protects the artist’s rendition of the song as fixed in a tangible form.<sup>14</sup> Thus, a copyright in the “sound recording” would protect Eric Clapton’s performance of *I Shot the Sheriff* as fixed on a compact disc or other medium.

## ii. Bundle of Rights

<8> To complicate the matter, the Copyright Act grants different bundles of rights to the owner of the “musical work” and to the owner of the “sound recording.” The owner of the “musical work” (i.e. Bob Marley’s lyrics and music) has the exclusive rights to reproduce the lyrics and music, adapt them into derivative forms, distribute them, publicly perform them and to put them on public display.<sup>15</sup> For example, the rights of reproduction and distribution would protect the songwriter/publisher’s interest in the underlying lyrics and music by preventing an unauthorized entity from making and distributing copies of works that embody the lyrics or the music. The right to adapt the “musical work” into derivative forms protects against sampling and other transformative uses of the lyrics or the music by unauthorized entities. Public performance rights protect against the performance of the lyrics or the musical notes in the score publicly, such as in live concerts or radio programs. Lastly, the right of public display protects against activities such as displaying the musical notes or lyrics of songs contained in a podcast on websites where the podcast is made available.

<9> The owner of the “sound recording” (i.e. Eric Clapton’s performance), on the other hand, has a slightly different bundle of rights. The owner of the “sound recording” has the exclusive rights to reproduction, adaptation and distribution of the “sound recording,” but does not have the exclusive right to public performance. Instead, the owner of the “sound recording” has a right of public performance that is limited to the performance “by means of a digital audio transmission.”<sup>16</sup> Thus, performances that fall outside the definition of “digital audio transmissions” are not protected. For example, terrestrial radio broadcasts are not “digital audio transmissions” and therefore terrestrial radio broadcasters may perform “sound recordings” without permission from the owners of the “sound recording.” This is in contrast to the underlying “musical work,” in which terrestrial radio broadcasters are still required to gain permission.

## iii. The Copyright Owners

<10> The use of copyrighted music is further complicated by the fact that the copyright owners hold some of the complementary rights, while other rights are regulated or controlled by other entities that administer certain rights on behalf of the owners.<sup>17</sup> This generally results in the necessity of negotiating for licensing agreements with multiple entities.

### a. With Respect to the Musical Work

<11> In general, the songwriter and/or the author’s music publisher owns the copyright in the “musical work” (i.e. Bob Marley’s lyrics to *I shot the Sheriff*).<sup>18</sup> In addition, the songwriter/publisher typically contracts with other entities to negotiate on their behalf with third-parties seeking clearance to certain rights in the “bundle of rights.”

<12> For example, a songwriter/publisher in the U.S. typically becomes affiliated with one of three major Performance Rights Organizations (“PROs”) to administer royalties associated with non-dramatic public performances of the underlying “musical work.” The American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music Incorporated (“BMI”), and SESAC, Inc. (formerly the Society of European State Authors & Composers) represent the majority of songwriter/publishers in the United States with

respect to nondramatic performance rights.<sup>19</sup>

<13> In addition, many songwriters/publishers contract with organizations such as the Harry Fox Agency ("HFA") to coordinate licenses to reproduce and distribute the "musical work." For example, HFA grants rights to make phonorecords<sup>20</sup>, such as compact-discs, of a particular work. HFA, is the foremost mechanical licensing, collection, and distribution agency for U.S. Publishers,<sup>21</sup> representing approximately 25,000 music publishers.<sup>22</sup>

b. With Respect to the Sound Recording

<14> Copyrights<sup>23</sup> in the "sound recording" (i.e. Eric Clapton's performance of *I shot the Sheriff*) generally are owned by a record company or label, but may also be owned by independent artists.<sup>24</sup> Record companies typically acquire the rights to the sound recording from the performing artists as part of a recording deal in exchange for financing and promoting the artists' recording projects.<sup>25</sup>

<15> While the record companies typically control all the rights associated with a "sound recording," it is possible to obtain a statutory license for certain public performances by means of digital audio transmissions under certain strict conditions.<sup>26</sup> A statutory license is a license provided by law that allows the licensee to use a copyrighted work without the explicit permission of the copyright owner. Typically, a statutory license sets royalty rates as well as conditions of use. In addition, a statutory licensing scheme may also establish a copyright collecting agency to receive or negotiate royalty payments.

<16> For example, The U.S. Copyright Office designated SoundExchange, a non-profit performance rights organization, to collect and distribute statutory royalties associated with some digital audio transmissions.<sup>27</sup> As a result, in some circumstances, discussed below, it is possible to avoid negotiation with individual record companies and deal directly with SoundExchange with regard to the performance right in "sound recordings."

		Sticks in the "Bundle of Rights"				
Typical Owners		Reproduction	Derivatives	Distribution	Display	Performance
Musical Work	Individual:	Songwriter	Songwriter	Songwriter	Songwriter	Songwriter
	Corporate:	Publisher	Publisher	Publisher	Publisher	Publisher
	Licensing Body:	HFA*	---	HFA*	---	PROs
Sound Recording	Individual:	Artist/Producer	Artist/Producer	Artist/Producer		Artist/Producer
	Corporate:	Record Company	Record Company	Record Company		Record Company
	Administering Body:	SoundExchange***	---	---		SoundExchange
		<p>*Harry Fox Agency typically provides mechanical licenses for reproducing and distributing musical work as embodied in phonorecords.</p> <p>**Performance right with regard to "sound recording" is limited to performances "by means of digital audio transmission."</p> <p>*** For ephemeral (temporary) copies used in qualifying digital transmissions.</p>				

MUSIC COPYRIGHT APPLIED TO (I) TERRESTRIAL BROADCASTING, (II) WEBCASTING AND (III) PODCASTING

i. Terrestrial Broadcasting

<17> Terrestrial broadcasting (or over-the-air broadcasting) only implicates a fraction of the rights and entities discussed above. The broadcast does not result in a reproduction or distribution of the "musical work" or the "sound recording" because the broadcast is simply a public performance of the music and does not result in the public retaining a copy. For this reason, terrestrial radio broadcasters do not have to negotiate with the songwriters/publishers and record companies for licenses associated with those rights.

<18> Terrestrial radio broadcasting does involve a public performance of the underlying "musical work" and therefore broadcasters generally turn to the PROs for licenses. While terrestrial broadcasters could in theory negotiate with each songwriter/publisher for a license to perform the "musical work," the PROs provide a more efficient licensing scheme. PROs provide a blanket license that covers every artist in their catalogue. Each major PRO maintains a catalog covering a vast number of "musical works" and by purchasing a blanket license; the licensee receives the right to perform any music from the PROs list. Thus, terrestrial radio broadcasters can gain clearance for performing the "musical work" for the majority of popular copyrighted music by acquiring blanket licenses from each of the three major PROs (ASCAP, BMI, & SESAC).

<19> Lastly, with regard to terrestrial broadcasting, the owner of the "sound recording" does not have a right to public performance because terrestrial broadcasts are not digital transmissions. As a result, it is unnecessary to negotiate with the record companies for performance rights in the "sound recording."

## ii. Webcasting

<20> A Webcast, broadly speaking, is a broadcast of an event or a recording of an event over the World Wide Web in audio or video format. This is distinguishable from podcasting in that the receiver does not receive a permanent digital copy of the webcast for playback at a later time. Instead, the user receives a transmission in real-time and thus must have an active connection to the World Wide Web in order to listen to or view the webcast.

<21> Unlike terrestrial radio broadcasting, webcasting involves a public performance right in the "sound recording" because webcasting is a digital audio transmission within the meaning of the Copyright Act. The Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA") established a limited public performance right in sound recordings with respect to some digital transmissions.<sup>28</sup> Subsequently, the Digital Millennium Copyright Act ("DMCA") clarified this limited public performance right, making it clear that this newly formed performance right in "sound recordings" was specifically applicable to webcasting services.

<22> In addition to creating a performance right in "sound recordings" by means of a digital audio transmission, the DPRSRA and DMCA created a statutory licensing scheme by which webcasters could bypass the record companies and obtain licenses to perform the "sound recordings" by adhering to strict limitations.<sup>29</sup> In order to qualify for a statutory license a webcast must be non-interactive.<sup>30</sup> A non-interactive service is one in which the recipient does not have the ability to receive specific sound recordings on request.<sup>31</sup> Other requirements for obtaining the statutory license include restrictions on posting an advanced playlist<sup>32</sup> and limiting the number of songs from a particular album or artist that are played within a given period.<sup>33</sup> Most importantly, the webcast must not result in the recipient retaining a copy of the "sound recording."<sup>34</sup>

<23> Once a webcaster meets the requirements for a statutory license, the webcaster obtains clearance for the performance of the sound recording through SoundExchange. As mentioned above, the U.S. Copyright Office designated SoundExchange to collect and distribute statutory royalties for qualifying digital audio transmissions. In addition to obtaining the statutory license to the performance rights, the webcaster can also obtain a statutory license for certain temporary copies used in transmitting the webcast.<sup>35</sup>

<24> In the alternative, if the webcast does not meet the requirements necessary for a

statutory license, then the webcaster must negotiate directly with each record company that holds rights to the music that the webcaster is seeking to perform.

<25> Lastly, in addition to obtaining clearance to perform the "sound recording," the webcaster, like the terrestrial broadcaster, must obtain clearance to perform the underlying "musical work." Again, the most efficient means of obtaining permission to perform most "musical works" is by obtaining blanket licenses from each of the three major PROs.

### iii. Podcasting

<26> Podcasting is distinguishable from terrestrial broadcasts and webcasting in that a podcast receiver does not have to be present at the time of transmission to hear the performance of the sound recording. In other words, the podcast need not result in a real-time performance of the music because the audience receives a copy of the transmission to play on-demand. As a result, it is questionable whether podcasting is a public performance within the meaning of the Copyright Act. If podcasting is a public performance, then like the webcaster, the podcaster must obtain licenses to perform the "musical work" and the "sound recording."

#### a. Public Performance in the Musical Work

<27> PROs have responded to the emergence of podcasting and currently offer blanket licenses to cover the performance of the "musical work" in a podcast. For example, ASCAP offers an Internet license agreement called "Non-Interactive 5.0" which covers podcasts that do not offer a play-list, program guide and do not make advance list of songs contained in the program available prior to their transmission.<sup>36</sup> Although the PROs offer an efficient way to license the performance of the "musical work," there is no efficient means available to license the performance of the "sound recording."

#### b. Public Performance in the Sound Recording

<28> Unlike webcasting, podcasting does not qualify for a statutory license under § 114 of the Copyright Act because the transmission results in the recipient retaining a copy of the performance. To qualify for a statutory license, § 114 explicitly prohibits the transmitting entity from taking any steps to cause the making of a copy.<sup>37</sup> As a result, if podcasting is a "public performance" then podcasters must negotiate with each record company that owns performance rights in the "sound recordings" that they wish to include in a podcast. Currently many podcasters have been assuming that they are required to obtain permission from the owners of "sound recordings" for including a mainstream song within a podcast. The fact that this requires obtaining individual permissions from record labels may be the primary reason why so little mainstream music appears in podcasts.

#### c. Is Podcasting Really a Public Performance?

<29> Whether a podcaster must obtain performance rights in general, however, depends on whether podcasting results in a public performance within the meaning of the Copyright Act. The Copyright Act provides that to "perform" a work means "to recite, render, play, dance, or act it, either directly or by means of any device or process."<sup>38</sup> Furthermore, the Act states that to perform a work "publicly" means to "transmit or otherwise communicate a performance . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times."<sup>39</sup>

<30> Facially, podcasting does not appear to be a public performance. Unlike terrestrial radio broadcasting or webcasting, the music distributed through podcasting is not necessarily audible at the time of transmission. In fact, a user may receive automatic downloads of a program and never listen to them. The delivery of a podcast appears to be a distribution method rather than a public performance.

<31> On the other hand, the language of the Copyright Act is broad and conceivably covers podcasting. The definition of “perform” includes rendering the work by means of “any ... process”<sup>40</sup> and “render” can be read as synonymous with delivery. This interpretation suggests that *any* process resulting in the delivery of the work to the public implicates the public performance right. Although this interpretation appears to encroach on the right to distribution, the sticks in the “bundle of rights” are cumulative and may overlap.<sup>41</sup> Thus, it is possible that podcasting implicates both the public performance right as well as the exclusive right to distribution.

<32> Then again, language in the Copyright Act implies that not *all* digital transmissions are public performances. In defining “digital phonorecord delivery,” § 115 states that delivery occurs when a “digital transmission of a sound recording . . . results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord..., *regardless of whether the digital transmission is also a public performance of the sound recording ...*”<sup>42</sup> A “phonorecord” refers to the material object in which sounds are fixed and can be perceived, reproduced, or otherwise communicated. In the case of podcasting, a “phonorecord” refers to the bits of data that reside on a user’s device which embody the music (i.e. the MP3 file).<sup>43</sup> From the above definition, the delivery by digital transmission of a MP3 file, for example, is a digital phonorecord delivery, *regardless of whether the digital transmission is also a public performance of the sound recording.*

<33> This statutory language leaves open the possibility that one can digitally transmit a “sound recording” without it also being a “public performance.” However, the text does not specify which kinds of digital transmissions would or would not be public performances. As a result, there appears to be no practical answer to what delineates the public performance right from reproduction and distribution rights with respect to digital transmissions.<sup>44</sup> In fact, this issue of whether a download constitutes a public performance has been raised before podcasts became available, but has never been definitively resolved.<sup>45</sup>

<34> If podcasting escapes the label of “public performance,” it would only simplify the licensing required to clear mainstream music by eliminating the need to obtain licenses from the PROs for public performance of the underlying “musical work.” Podcasters could not escape negotiating with record companies for rights to the “sound recording.” Although record companies would not be able to restrict use of mainstream music through withholding “performance rights,” the record companies could restrict use of its music by refusing to license its exclusive rights to reproduction and distribution.

<35> Unlike terrestrial broadcasts and webcasting, podcasting results in the retention of a fixed copy of the “musical work” and “sound recording” by the podcast receiver. As a result, podcasting without the necessary licenses will violate both the copyright in the distribution and reproduction of the “musical work” and the “sound recording.”

#### d. Clearance to Reproduce and Distribute the Musical Work

<36> With respect to the “musical work,” it is conceivable that a podcaster could obtain a compulsory license to reproduce and distribute the work.<sup>46</sup> A compulsory license is an exception to copyright provided by law that would allow a podcaster to use the copyrighted work without the explicit permission of its owner. In order to receive a compulsory license, however, the podcaster must comply with requirements provided by § 115 of the Copyright Act.<sup>47</sup>

<37> Reproduction under the compulsory license of § 115 also requires that the owner of the “sound recording” authorize the making of the podcast.<sup>48</sup> Therefore, in order to obtain a compulsory license to reproduce and distribute the underlying “musical work,” the podcaster must successfully negotiate with the owner of the “sound recording” (typically the record companies). Essentially, the owner of the “sound recording” can act as a gatekeeper to the underlying “musical work” with respect to obtaining a compulsory license to a particular “sound recording.” This does not mean, however, that any one particular copyright owner of the “sound recording” can completely



foreclose the ability to obtain a compulsory license of the underlying "musical work." A podcaster could always seek clearance from another copyright owner of a "sound recording" embodying the "musical work" or create one herself.

#### e. Fears of Record Companies Appear to Hinder Emergence of Efficient Licensing Schemes

<38> Record companies could hinder the growth of podcasts containing mainstream music by refusing to grant licenses. This could occur regardless of whether podcasts are a public performance or simply a means of reproduction and distribution. Record companies currently appear hesitant to deal with podcasters due to fear of lost revenue due to music piracy.<sup>49</sup> In addition, record companies may be cautious to embrace podcasting due to fears that podcasts may negatively impact other revenue streams, such as the sales of compact discs and downloadable songs through services such as iTunes. Although market substitution may be a legitimate fear, the fear of piracy may be misplaced.

<39> A licensing scheme similar to that developed for webcasting could protect against piracy. For example, licensors could restrict podcasters from publishing a playlist or placing restrictions on the number of songs that can be played from a given album or artist. Alternatively, licensors could require podcasters to incorporate dialogue over the leading or trailing end of songs to prevent the transmission of a complete recording, thus lowering the desirability of the song to pirates without changing the fundamental character of the music. Furthermore, it seems unrealistic to assume that music pirates would be willing to take the time to dissect podcasts for popular music that is available to pirate through easier means, such as peer-to-peer networks. Although threats of piracy can be mitigated by these means, an efficient licensing scheme has yet to emerge.

#### RECOMMENDATIONS

<40> A podcaster has several options until rights issues are clarified with regard to the inclusion of mainstream music in podcasts. First, a podcaster can try to negotiate licenses for all of the copyrighted music that is contained in the podcast. At a minimum, this would include negotiating for the reproduction and distribution rights for both the "sound recording" and the "musical work." For the "sound recording," this would require negotiating directly with record labels for each song. This task, however, is difficult due to the vast number of parties involved. In addition, the podcaster should also negotiate for public performance rights because it is currently unsettled whether a podcast is a public performance.

<41> As an alternative, a podcaster could incorporate music that is "pod-safe," in other words, music that has entered the public domain or that is available under a Creative Commons license.<sup>50</sup> A Creative Commons license grants others the right to modify and use an artist's work according to prearranged terms.<sup>51</sup> Utilizing music under a Creative Commons license, however, may come with its own restrictions, such as attributing the work to the author or limiting the use of the music to noncommercial activities. Despite the restrictions that exist, the use of Creative Commons licenses is growing and databases of pod-safe-music are developing. While much of popular music would remain unusable, the use of pod-safe music offers a valuable alternative.

<42> Another alternative is to acquire statutory licenses to reproduce the underlying "musical work" through § 115 of the Copyright Act or through the Harry Fox Agency, along with blanket licenses to perform the "musical work" through the PROs. This would allow podcasters the option of recording their own covers of popular songs to include in podcasts. Of course, this option requires significant investment and the ability to produce and record music. While not an ideal solution, this option at least provides the ability to include the underlying "musical work" into a podcast.

<43> Lastly, apart from a few uses of copyright-protected music that might be excused under "fair-use"<sup>52</sup> or other limited exceptions under the Copyright Act,<sup>53</sup> a podcaster is left with few options. As a final option, a podcaster could simply avoid the use of

copyright-protected music altogether and avoid the potential liabilities that using it would otherwise entail. While none of these alternatives are ideal, it is all that a podcaster can do until more efficient licensing arrangements emerge.

## CONCLUSION

<44> Podcasting is a new distribution medium that is ideal for delivering various programs that contain mainstream music. However, podcasters have generally avoided including mainstream music in podcasts due to the lack of clarity in how copyright applies to the technology and because of the fear of music piracy by major record companies. While there exists efficient licensing means for terrestrial broadcasts and webcasting, there are not efficient means by which to secure the necessary rights to mainstream music for use in podcasting. As a result, podcasters are generally left with the option of not using music altogether, recording their own music, or with using music that is "pod-safe."

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## Footnotes

1. Jared M. Barrett, University of Washington School of Law, Class of 2007. I thank Professor Dan Laster, Professor Anthony Reese, the Thomas W. Gregory Professor at the University of Texas School of Law, Colette Vogele, partner at Vogele & Associates and Fellow at the Stanford Center for Internet & Society, and Professor Anita Ramasastry for providing exceptional guidance and helpful feedback on this article.
  2. Digital Performance Right in Sound Recording Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 101, 106, 111, 114 to 115, 119, 801 to 803 (2006)).
  3. Digital Millennium Copyright Act (Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. §§ 512, 1201 to 1205, 1301 to 1332 and 28 U.S.C. § 4001 (2006))).
  4. For example, a 30-minute program might contain a few hit recordings, some original commentary and various other content.
  5. Lionhardt Technologies: Webpod Studio – What is Podcasting?, <http://www.lionhardt.ca/wps/whatispodcasting.asp> (last visited July 30, 2006).
  6. See Podcast.net - The Podcast Directory, <http://www.podcast.net> (last visited July 30, 2006).
  7. Podcasting thus raises copyright issues similar to those that have arisen for other types of download transmissions. See R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 257-65 (2001) for a discussion of copyright issues related to download transmissions.
  8. Collegiate Broadcasters, Inc., Podcasting Music – The Legal Implications – CBI, <http://www.collegebroadcasters.org/podcast.shtml> (last visited July 30, 2006).
  9. President Bush's Radio Addresses by Date and Topic, <http://www.whitehouse.gov/news/radio/> (last visited July 30, 2006); RushLimbaugh.com Home, <http://www.rushlimbaugh.com/home/today.guest.html> (last visited July 30, 2006).
  10. Cathy Yang, *Podcasters Hit the Copyright Wall*, BusinessWeek Online, May 25, 2005,
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11. *Id.*
12. See 17 U.S.C. §§ 106, 114 (2006).
13. Joyce Craig-Rient, *Time to Face the Analog Music: How Traditional Radio Broadcasters Infringe Copyrights and What the Music Industry and Congress Can Do to Stop Them*, 72 GEO. WASH. L. REV. 621, 629 (2004).
14. *Id.*
15. 17 U.S.C. § 106. The owner of copyright...has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. *Id.*
16. *Id.* § 106(6).
17. Craig-Rient, *supra* note 9, at 630.
18. See 6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.02 (2006) [hereinafter Nimmer].
19. Further information about these organizations can be found at their respective web sites: [www.ascap.com](http://www.ascap.com) , [www.bmi.com](http://www.bmi.com), and [www.sesac.com](http://www.sesac.com).
20. See 17 U.S.C. § 101. "Phonorecords" are "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed. *Id.*
21. HFA Online, <http://www.harryfox.com/index.jsp> (last visited July 30, 2006).
22. William Coats, *Rights of Publicity and Entertainment Licensing*, 845 P.L.I./Pat. 303, 322 (2005).
23. Statutory copyright does not extend to sound recordings first fixed prior to February 15, 1972. However, an exception to federal pre-emption allows the states to accord their own protection to sound recordings fixed prior to that date. See 2 NIMMER § 8C.03.
24. See 6 NIMMER § 30.03.
25. Richard Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 336 (2002).
26. See 17 U.S.C. § 114(d)(2) (2006).
27. See 37 C.F.R. § 262.4(b) (2006); see also SoundExchange – About Us, <http://www.soundexchange.com/about/about.html> (last visited July 30, 2006) and [http://www.soundexchange.com/about/documents/SX\\_Notice\\_of\\_Designation.pdf](http://www.soundexchange.com/about/documents/SX_Notice_of_Designation.pdf) (last visited July 30, 2006).
28. 17 U.S.C. § 106(6) (2006).

29. *See id.* § 114(d)(2).
30. *Id.* § 114(d)(2)(A)(i).
31. *See id.* § 114(j)(7).
32. *Id.* § 114(d)(2)(C)(ii).
33. *See id.* §§ 114(d)(2)(C)(i), (j)(13).
34. *Id.* § 114(d)(2)(C)(vi).
35. *See id.* § 112.
36. ASCAP Internet License Agreements, <http://www.ascap.com/weblicense/> (last visited July 30, 2006).
37. 17 U.S.C. § 114(d)(2)(C)(vi).
38. *Id.* § 101.
39. *Id.*
40. *Id.* (emphasis added).
41. H.R. Rep. No. 94-1476, at 61 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5674.
42. 17 U.S.C. § 115(d) (emphasis added).
43. *See* R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 242 (2001).
44. *See* 2 Nimmer § 8.24.
45. *See* Reese, *supra* note 35, at 242; *see also* Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, at 71 (1995) available at <http://www.uspto.gov/web/offices/com/doc/ipnii/> (last visited July 30, 2006).
46. *See* 17 U.S.C. § 115(a)(1).
47. One requirement is that a compulsory license “shall not change the basic melody or fundamental character of the work.” *Id.* § 115(a)(2). Therefore, the podcaster must be sure not to modify the “musical work” in adapting a particular song into a podcast.
48. *Id.* § 115(a)(1).
49. Michelle Kessler, *Storm Clouds Gather Over Podcasting*, USA Today, August 3, 2005, available at [http://www.usatoday.com/money/media/2005-08-03-podcasting-usat\\_x.htm](http://www.usatoday.com/money/media/2005-08-03-podcasting-usat_x.htm) (last visited July 30, 2006).
50. *See* Colette Vogele, Esq. et al., *Podcasting Legal Guide*, v1.0 § 1.5 (2006), [http://wiki.creativecommons.org/Welcome\\_To\\_The\\_Podcasting\\_Legal\\_Guide](http://wiki.creativecommons.org/Welcome_To_The_Podcasting_Legal_Guide) (last visited July 30, 2006) and <http://cyberlaw.stanford.edu/about/cases/> (last visited July 30, 2006).
51. Choosing a License – Creative Commons, <http://creativecommons.org/about/licenses> (last visited July 30, 2006).
52. An in-depth discussion of “fair-use” as it applies to musical work and sound recordings is beyond the scope of this article.
53. *See* 17 U.S.C. § 110 (enumerating exceptions to a copyright owner’s exclusive rights involving certain nondramatic performances of musical work for educational and religious purposes).

